IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN AT JODHPUR

: J U D G M E N T :

Smt. Rukma. vs. Shyam Lal.

(S.B.Civil Second Appeal No.233/2002)

DATE OF ORDER ::: AUGUST 4, 2005

P R E S E N T

HON'BLE MR. JUSTICE PRAKASH TATIA

Mr. MC Bhoot, for the appellant.
Mr. AR Nikub, for the respondent

BY THE COURT :

REPORTABLE

Heard learned counsel for the parties.

Brief facts of the case are that the plaintiff/ respondent filed a suit for eviction against the defendant/ appellant alleging that the defendant is a tenant in the suit property on a rent of Rs.150/- per month. The defendant paid rent to the plaintiff upto the period of January, 1982 but thereafter, she did not pay any rent to the plaintiff, therefore, the plaintiff sought a decree for eviction of tenant on the ground of default committed by the defendant in payment of rent. The plaintiff also pleaded that the suit property has been sublet to one MA

Ansari by the plaintiff on monthly rent of Rs.300/-. Yet another ground for eviction is that the suit property is required for the personal need of the plaintiff as the plaintiff is residing in a rented house and the plaintiff has a large family of 14 members.

The defendant submitted written statement alleging that she is owner of the house and she is residing in the house since last 22 years or even before. She took a specific plea that the house in question was not taken on rent by the defendant nor she paid rent to the plaintiff at any time and, therefore, there is no relationship of landlord and tenant between the plaintiff and defendant. In the sequence, she also denied that she defaulted in payment of rent.

The trial court framed the issues and before that determined the interim rent and directed the defendant tenant by order dated 25.1.1996 to pay the determined arrears of rent and to pay rent further month by month. The defendant submitted an application on 3.2.1996 and sought extension of time for depositing the rent. On this application, time for depositing the rent was extended by the trial court's order dated 3.2.1996 itself. However, the defendant did not deposit the rent. An application was submitted by the plaintiff for striking out of defence of the defendant, upon which the trial court vide order dated 26.11.1996 struck off the defence of the defendant. In the trial court, the plaintiff examined himself and produced

two witnesses. The case was fixed for the evidence of the defendant on 23.5.1998 and time was sought by the defendant on 23.5.1998 and 28.7.1998 and again on 26.8.1998 upon which the trial court granted last opportunity to produce the evidence. On 10.11.1998, nobody appeared to give evidence and, therefore, the trial court closed the evidence of the defendant by order dated 10.11.1998. This order was not challenged by the defendant and the defendant submitted an application on 3.12.1998, the date on which the case was fixed for final arguments. By the said application, the defendant sought indulgence of the Court for reopening of the evidence of the defendant but the trial court by order dated 3.12.1998 rejected the appellant's application and thereafter, arguments were heard and the suit was decreed against the defendant by the trial court by the impugned judgment and decree dated 3.2.1999.

The appellant tenant aggrieved against the judgment and decree dated 3.2.1999 preferred appeal. The appellate court dismissed the appeal of the appellant vide judgment and decree dated 7.8.2002. Hence, this second appeal.

According to learned counsel for the appellant, the appellant submitted application before the trial court and stated that she could not appear on the day when the case was fixed for the evidence of the defendant because of death of sister-in-law of her son Suresh and she want to Jaitaran on 8.5.1998 and stayed there 10.11.1998.

Therefore, she could not appear before the trial court to give her statement on the day when the case was fixed for evidence of the defendant. The plaintiff also submitted that now she is ready to give her statement and, therefore, her statement may be recorded.

According to learned counsel for the appellant, since the appellant herself appeared before the trial court, therefore, the trial court should have allowed the appellant to give her statement. In the application, she stated that she want to say only that she is not tenant in the suit premises and the name of her husband has wrongly been given by the plaintiff.

According to learned counsel for the appellant, the trial court committed serious illegality in rejecting the appellant's application and according to learned counsel for the appellant, the application was rejected by the trial court only on the ground that the appellant took five opportunities for evidence but did not consider the reason given by the appellant for her non-appearance on the day her evidence was closed. Learned counsel for the appellant submitted that in identical circumstances, the Hon'ble Supreme Court in the case of State Bank of India vs. Chandra Govindji (km.) reported in 2000(8) SCC 532 held that as long as reasonable ground exists on the date the adjournment is next sought, the Court should not, influenced by the other earlier adjournments, pass adverse order. According to learned counsel for the appellant in

view of the fact that in the trial court, merely influenced by the past conduct of the defendant, the trial court did not give opportunity to the defendant to give statement in rebuttal.

Learned counsel for the appellant submits that now in second appeal, the appellant has submitted an affidavit along with application under Order 41 Rule 27 CPC and, therefore, the affidavit may be taken on record as evidence under the provisions of Order 41 Rule 27 CPC. According to the learned counsel for the appellant, after this, the matter will remain only for cross examination of the defendant and thereafter, the matter can be decided afresh.

I have considered the submissions of learned counsel for the parties and have perused the reasons given by the Hon'ble Supreme Court in the case of Chandra Govindji (supra).

The defendant's/appellant's evidence was closed and she did not challenged that order by filing revision in High Court. The defendant challenged the order of the trial court in an appeal after the trial court passed the decree against her. Before that, the appellant was directed by the court to pay the arrears of rent which she did not pay. The defendant sought time for depositing the rent which was granted by the court still she did not pay the arrears of rent or monthly rent. On application of plaintiff, her defence was struck off. She took five adjournments for her

evidence but she did not appear to give her alleged one line statement. It is not a case as simple as presented by the learned counsel for the appellant in the light of totality of the facts. It is true that in case party took adjournments on earlier occasions it itself alone is no ground to deny the further adjournment if the party proves sufficient ground for adjournment on adjourned date to the satisfaction of the court and the court are not powerless in granting further adjournment but taking several adjournments, deliberately delaying the proceedings raising frivolous objections to delay the court proceedings and other relevant facts cannot be ignored by the Court. If all these facts are considered to find out whether the cause shown for seeking adjournment is bonafide or not, the court not only can do so well within its jurisdiction but the court is under legal obligation to consider all above facts and other relevant facts while adjourning the cases and further while putting the clock back by reopening the closed evidence. The legal obligation of the court in such matters is given in various provisions made in the Civil Procedure Code against granting necessary adjournments by the Courts. The parties cannot be made to suffer because of technicalities of law but at the same time the parties cannot take benefit out of technicalities of law to delay and defeat the justice. Therefore, what has been laid down by the Hon'ble Apex Court in the case of Chandra Govindji (supra) is not that past conduct of the parties cannot be looked at all and for all purposes and even for the purpose to find out whether the reasons submitted by the parties

has bonafide or not. The party seeking relief on the basis of his bonafides cannot say judge-my-bonafide-from-my-own-one-act-only, which he has presented today only.

From facts of this case, I do not find that the two courts below have committed any error of fact or law. The appellant admittedly had no right to give her statement when her evidence was closed. She sought indulgence and when indulgence is sought, the conduct of the parties become relevant. In this case, one of the factors considered by the trial court for not allowing prayer of the defendant for reopening of her statement was that she took five adjournments on earlier occasion and that was not the sole ground for denial of relief to the appellant. In this case, dates show that the defendant in the entire trial of the suit took more than sufficient time for her evidence and she did not even inform her advocate that she will not be coming on 10.11.1998. There is no explanation why she did not inform her advocate. The case of the defendant presented after closure of evidence of the defendant is that her son's sister-in-law died at Jaitaran on 8.11.1998 but in the application, it has not been mentioned that when she went Jaitaran. However, she stated that she stayed there till 10.11.1998. Virtually no specific particulars have been given by the appellant to demonstrate that there was no sufficient time for her to inform advocate to seek time from the Court. There is no explanation that in case the defendant came back after 12th day from Jaitaran, then why she did not move the

application before the Court immediately thereafter. Apart from above, this Court cannot ignore this fact that the appellant, who took the plea that she is owner of the property herself sought time for depositing rent before the trial court by moving application in writing and the defence of the appellant has already been struck off by the trial court. Not only this, the record was summoned by this Court and it appears from the written statement filed by the defendant that she though pleaded that she is owner of the suit property but without disclosing that how she is owner of the suit property. All these facts were examined by this Court only to see whether any injustice has been done to the appellant tenant by taking view by the Courts below and for that purpose, all facts which are available on record of the trial court are examined to find out whether it is a case for passing any equitable order in favour of the appellant.

This Court is of the opinion that looking to the totality of the facts and conduct of the appellant, the courts below have not committed any error of law or error of fact in denying the opportunity to the defendant to get reopen of order of closure of evidence. The equity always does not lie in favour of the party who is negligent merely on the ground that if the order will not be set aside, the natural consequences will follow and by these consequences, one will have to vacate the premises.

This is a case under the provisions of Rent Control Act

and according to learned counsel for the appellant himself, the question of title neither could have been decided nor has been decided in this suit, therefore, if the appellant feels that she is being evicted as tenant and she is owner of the property and issue of title has not been decided, she can prove the title in regular suit and not in the suit under Rent Control Act. Therefore also, there arises no reason for setting aside the orders passed by the courts below on the application filed by the defendant.

The appellant submitted an application under Order 41 Rule 27 CPC before this Court on 11.4.2005. It appears that the appellant is under impression that all equities lean in favour of the persons who are guilty of delay and laches. Therefore, an argument has been advanced by the learned counsel for the appellant that since the appellant has now in second appeal filed an affidavit which is admission in chief of the appellant/defendant, therefore, only question remains is to accept this evidence of the defendant and set aside the decree passed by the trial court and set aside the appellate court's judgment and decree also and direct the plaintiff to cross examine the defendant and the suit may be decided afresh.

If the plea of the appellant is accepted that since the defendant has filed an affidavit before this Court in second appeal and now only matter remains is cross examination of the defendant and then in no case or at no point of time, second appellate court can refuse such

permission as now after amendment of CPC, the examination-in-chief are recorded by the affidavit. The case will become more grave when the parties one after another start submitting affidavit before trial court or first appellate court with a prayer that since now they have filed affidavit and the matter now remains for cross examination of his or her witness and there will be no need of even summoning of witness by the court and the court can direct other party to cross examine the witness. Such an argument can only destroy the purpose for which the examination of chief is allowed by way of affidavits of the witness. Therefore, affidavit of witness filed after closure of the evidence is not only affidavit filed without permission of the court but is filed contrary to court's order of closing evidence of the witnesses and, therefore, cannot become examination in chief automatically till court passes an order by recording reasons to accept the evidence of a party within the provisions of law for allowing evidence of party. The parties cannot overreach the statutory restrictions in this manner by saying that “there is no harm in it” or “otherwise it will cause hardship to the defaulting party” etc. If such pleas are accepted, there will never be end of any litigation resulting into denial of justice. In the application filed under Order 41 Rule 27 CPC, there is not a single word for not taking this step by the appellant, which she now wants to take after delay of about more than 1½ years even from the date of filing this second appeal before this Court. The application has even not been filed immediately after the amendment of CPC which

allowed the parties to submit their examination-in-chief in the form of affidavit. Therefore, the application filed by the appellant deserves to be dismissed only on this count that no cause has been shown by the appellant for moving this application after such an inordinate delay.

Apart from the above, since this Court held that the order of the trial court and the appellate court of not allowing the defendant's evidence is just and legal, then there arises no question for this Court to allow the defendant to produce defence keeping the order of closing of evidence intact.

So far as this appeal is concerned, there is no substantial question of law involved in view of the fact that there is unrebutted evidence of the plaintiff wherein the plaintiff clearly stated that the defendant is tenant and she did not pay the rent of the premises to the plaintiff and she did not pay the rent of the premises to the plaintiff and other findings are also finding of fact only. It is not a case where the findings have been recorded by the courts below without there being any evidence. This Court cannot interfere in the concurrent finding of fact when the finding is based on some evidence and sufficiency of evidence or there could have been more evidence cannot be a ground to interfere in the findings of fact by two courts below.

According to learned counsel for the appellant, the

plaintiff did not state on oath on which date the tenancy commenced and on which the date the defendant paid the rent to the plaintiff and, therefore, on this count also, this Court may held that the findings of the court below on issue no.1 is perverse.

Record was summoned by this Court and it is apparent from the entire evidence of the plaintiff that the plaintiff since faced with the situation of denial of the title, therefore, he produced a license which was issued by the UIT in plaintiff's favour. He also produced certain other documents and he clearly stated that the defendant took the premises on rent at the rate of Rs.150/- per month from the plaintiff. In cross examination, only one question was put to the defendant and that was the suggestion that only whether the plaintiff had any documents to prove the tenancy or not. Not a single other question has been put to the plaintiff in cross examination and there is no cross examination on the point that the defendant is not tenant of the plaintiff. There is no cross examination that the rent was never paid by the defendant to the plaintiff. There is no suggestion that the defendant is owner of the property when that was the specific plea taken by the defendant in her written statement. Therefore, assuming for the sake of argument that the defendant took the plea of ownership and, therefore, she did not deposit the rent and she wants to establish that she is owner of the property and, therefore, she cannot be tenant in the property of the plaintiff, there is nothing on record to confront the plaintiff apart from the fact that the defendant did not

cross examine the plaintiff on any of the point of tenancy.

In view of the above, the courts below have not committed any illegality in relying upon the testimony of the plaintiff whose testimony has not been challenged by the defendant in cross examination on material point of tenancy.

In view of the above discussion, this second appeal is dismissed and the application under Order 41 Rule 27 CPC is also dismissed.

(PRAKASH TATIA), J.

S.Phophaliya